

Case No. 08-100366-A

IN THE COURT OF APPEALS
OF THE
STATE OF KANSAS

THE STATE OF KANSAS,
Plaintiff/Appellee

-vs-

ERIC L. NEAL
Defendant/Appellant,

BRIEF OF APPELLANT

Appeal from the District Court of Sedgwick County, Kansas
The Honorable Paul Clark
Judge of the District Court
District Court Case No. 00 CR 529/00CR1253

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I.

NATURE OF THE ACTION

This is a direct appeal to the Kansas Court of Appeals following the denial of Mr. Neal's Pro Se Motion to Correct an Illegal Sentence filed in his criminal cases, which were consolidated for consideration by the court.

II.

ISSUE ON APPEAL

- A. The district court erred by failing to consider the issues raised in Mr. Neal's Motion to Correct an Illegal Sentence.**

III.

FACTS OF THE CASE

In August, 2007, Mr. Neal filed a motion titled Motion to Correct an Illegal Sentence. (R. III, 22).

Mr. Neal's motion asserted that he had suffered an illegal sentence because the sentencing court erred in using two uncounseled misdemeanor batteries to enhance Mr. Neal's criminal history score; that his speedy trial rights were violated and that he suffered illegal sentencing procedures. (R. III, 22)

The State filed a response to Mr. Neal's motions and stated that Mr. Neal's motions could not be considered because Mr. Neal had challenged the validity of his criminal history score on direct appeal and had no further right of review. The State further argued he waived the speedy trial issue on direct appeal and could not raise it now. (R. III, 61). The State also averred that the speedy trial argument failed as Mr. Neal was complaining that he personally did not authorize the continuances taken by his attorney and that such could not afford relief because there is no requirement for counsel to consult with a client regarding continuances and that such decision were strategic and within the purview of counsel. Id.

The district court held no hearing and adopted the State's findings of fact and conclusions of law as its own. (R. III, 64-66).

A timely Notice of Appeal was filed and this brief follows.

IV.

ARGUMENTS AND AUTHORITIES

A. The district court erred in its findings of fact and conclusions of law regarding Mr.

Neal' Motion to Correct an Illegal Sentence.

1. Standard of

Review.

K.S.A. 22-3504 and 60-1507 are treated the same for purposes of determining when an evidentiary hearing is required. See Love v. State, 280 Kan. 553, 557, 124 P.3d 32 (2005). Therefore, because the district court denied Griffin's motion without conducting an evidentiary hearing, the standard of review is de novo. See Bellamy v. State, 285 Kan. 346, Syl. ¶ 3, 172 P.3d 10 (2007).

2. The district court erred in finding that Mr. Neal could have raised the issue of uncounseled misdemeanors in his direct appeal.

The district court found that Mr. Neal had challenged his criminal history score on direct appeal and could not raise any such related issues again. (R. III, 65).

However, the record shows that the issue could not have been raised on direct appeal based on the failure of trial counsel to object to the criminal history score at the time of Mr. Neal's sentencing or during the 20 day stay imposed by the trial court to allow such a challenge to occur.

At sentencing, Ms. Martin, Mr. Neal's counsel, informed the court that she had been involved in a murder trial and did not get to review Mr. Neal's PSI until just before sentencing. She had noted that his criminal history score was higher than anticipated and had questions about some of the underlying misdemeanors that had been aggregated into a person felony. (R. VIII, 5-6). Ms. Martin stated the state had some documents to support the misdemeanors but that she had not reviewed them and requested time to challenge the criminal history score. (R. VIII, 6). Ms. Martin's request was granted and a 20 day stay of sentence was allowed by the court to allow Ms. Martin to review the State's documents and file an objection. (R. VIII, 10).

Ms. Martin never made nor filed a motion objecting to Mr. Neal's criminal history score and

never challenged the validity of the two prior misdemeanors nor put the burden on the State to prove the validity of the convictions.

Because of this failure by counsel, Mr. Neal was prevented from raising the issue of the uncounseled misdemeanors on direct appeal because the issue was never raised before the trial court. Kansas law is clear that issues not raised before a trial court cannot be raised on appeal. Miller v. Bartle, 283 Kan. 108, 119, 150 P.3d 1282 (2007).

Thus, the district court erred in finding that Mr. Neal could have raised the issue on direct appeal. The matter needs to be remanded due to the district courts error.

3. The district court erred in finding Mr. Neal's sentence to be valid.

Mr. Neal did not stipulate to his criminal history score and, apparently, fully expected counsel to file a motion contesting the criminal history score. This did not happen.

Further, apparently Mr. Neal also expected counsel to file a timely Notice of Appeal, which did not happen either. Mr. Neal was only able to get his appeal docketed due to a finding by the trial court that Ortiz exceptions applied. (R. I, 60).

However, counsel never filed a motion challenging the misdemeanors. Mr. Neal did not stipulate to his criminal history score. While an illegal sentence may be corrected at any time, the law is well settled that a criminal defendant who stipulates to a criminal history score cannot challenge the use of the criminal history score to calculate the sentence because its use has been invited by the defendant's stipulation. See State v. McBride, 23 Kan.App.2d 302, 304, 930 P.2d 618 (1996). An exception to this rule arises where a defendant does not receive an opportunity to review the PSI report and defense counsel stipulates to the score on his or her behalf. See State v. Vandervort, 276 Kan. 164, 175-77, 72 P.3d 925 (2003).

While it is not clear from the record whether Mr. Neal was able to review his criminal history score, it would appear unlikely as Ms. Martin did not appear to have time to review the PSI and/or make any challenges thereto because she had been in trial and to busy to do so. (R. VIII, 5-6).

Further, Mr. Neal specifically pled in his motion that he had never reviewed the criminal history worksheet with Ms. Martin prior to sentencing. (R. III, 38).

Thus, Mr. Neal's challenge to his sentence and the criminal history score falls within one of the exceptions that would allow review of his issues. Again, the district court erred in its legal conclusions.

“In K.S.A. 21-4721(e), the legislature established appellate jurisdiction to consider whether the sentencing court erred in determining the appropriate classification of a prior conviction. Case law establishes precedent for granting appellate review of criminal history errors despite a stipulation or lack of an objection below under limited circumstances. In the present case, where there was no oral stipulation by Vandervort in open court and no opportunity for him or counsel to review the amended criminal history worksheet prior to the hearing, we will proceed to the merits of his argument.” State v. Vandervort 276 Kan. 164, 177 (2003).

The district court found that Mr. Neal's challenge to the basis for his criminal history score did not qualify as a challenge to an illegal sentence. (R. III, 65). However, this Court has held otherwise. In State v. Donaldson, 35 Kan.App.2d 540, 133 P.3d 154 (2006), this court again analyzed whether a defendant who pled guilty may subsequently claim an illegal sentence based upon an erroneous criminal history score. The court determined that a defendant who stipulates to or fails to object to his or her criminal history score may appeal the legal basis for the criminal history score, but not the factual basis: Essentially, the error raised by the defendant in his motion to correct an illegal sentence and in this appeal involves the application of law. As such, no party can properly stipulate to an incorrect application of the law. See Bright v. LSI Corp., 254 Kan. 853, 859, 869 P.2d 686 (1994). Therefore, the defendant's failure to object to his criminal history score, as required by K.S.A.2005 Supp. 21-4715(c), merely prevents him from challenging the factual basis for the criminal history classification applied in this case. 35 Kan.App.2d at 544.

Further, where the parties have not stipulated to the criminal history, an error in determining criminal history can subsequently be corrected by the district court. The sentencing guidelines are

based on two controlling factors: crime severity and criminal history of the defendant. Consequently, if either the crime severity level or the criminal history score are in error, a party can challenge a sentence as being illegal under K.S.A. 22-3504. State v. Lakey, 22 Kan.App.2d 585, 586, 920 P.2d 470 (1996).

“By definition, an illegal sentence encompasses a sentence to which the district court assigned an incorrect criminal history to a criminal defendant.” State v. Donaldson, 35 Kan.App.2d 540, Syl. ¶ 2, 133 P.3d 154 (2006); see State v. Reedy, 25 Kan.App.2d 536, 537-38, 967 P.2d 342, *rev. denied* 266 Kan. 1114 (1998); State v. McCallum, 21 Kan.App.2d 40, 46, 895 P.2d 1258, *rev. denied* 258 Kan. 861 (1995).

Thus, Mr. Neal’s challenge to the legality of the application of the prior battery misdemeanors as to both the failure of his counsel to properly challenge the misdemeanors and the failure of the State to fully prove that counsel was, in fact, actually waived in those cases, as denied by Mr. Neal, means that there are legal issues that need to be reviewed by the district court and that the motion to correct an illegal sentence was the appropriate measure to insure such a challenge.

As the district court’s factual findings and legal conclusions were, again, erroneous, the matter needs to be remanded to the district court for a proper review and assessment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that two true and correct copies of the above and foregoing Brief was placed in the U.S. Mails, postage prepaid to the following:

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